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In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PEPSI-COLA BUFFALO BOTTLING COMPANY AND SQUIRT-VERNORS OF BUFFALO, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–10a) is reported at 409 F. 2d 676. The Board's decision and order (App. C, *infra*, pp. 13a–23a) are reported at 171 NLRB No. 28; the decision of the Regional Director in the related representation case (App. C, *infra*, pp. 24a–38a) is not officially reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* p. 11a) was entered on March 25, 1969, and the Board's timely petition for rehearing and suggestion for rehearing in banc was denied on May 15, 1969 (App. B, *infra,* p. 12a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board is required to give plenary review to a regional director's determination of the unit appropriate for purposes of representation under the National Labor Relations Act before entering an unfair labor practice order based on that determination, although Section 3(b) of the Act specifically permits the Board to delegate to its regional directors its authority to make such determinations and provides only for discretionary Board review, which was denied in this case.

STATUTE AND RULES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations (29 C.F.R. 102.1, *et seq.*) are set forth in App. D, *infra,* pp. 39a–43a.

STATEMENT

Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b), (App. D, *infra,* p. 39a) authorizes the National Labor Relations Board "to delegate to its regional directors its powers under section 9 to

determine the unit appropriate for the purposes of collective bargaining," as well as its other powers concerning representation issues. It further provides that, upon request of an interested person, "the Board may review any action of a regional director delegated to him." The Board has adopted rules, based on this authority, delegating its powers to determine representation issues to its regional directors, subject to the right of a party to seek review by the Board (29 C.F.R. 102.67, App. D, *infra*, pp. 41a–43a). The rules regarding review provide that (29 C.F.R. 102.67, App. D, *infra*, pp. 42a–43a):

> (c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of (i) the absence, or (ii) a departure from, officially reported Board precedent.
>
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.
>
> (d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to

> ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. * * *
>
> (f) * * * Failure to request review shall preclude [the] parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

The Company, a manufacturer of soft drinks, distributes its products to its customers through driver-salesmen and "distributors" under close company control.[1] In February 1967, District 50, United Mine Workers Union of America, filed a petition under Section 9(c) of the Act (29 U.S.C. 159(c)) for a representation election in a unit of these driver-salesmen and distributors. The Company opposed the petition, contending that the distributors were independent contractors not covered by the Act. After a hearing, the acting Regional Director determined, for reasons stated at length in his opinion (App. C, *infra,* pp. 33a–35a), that the driver-salesmen and distributors were employees, and that they constituted an appropriate unit for collective bargaining. He thus directed an election in that unit.

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[1] The facts relating to the conditions of a distributor's employment, not directly relevant here, are set out at length in the regional director's opinion, App. C, *infra*, pp. 28a–33a.

The Company requested the Board to review the director's decision on the grounds that it entailed a "disregard of and departure from Board precedent" and that the director's "findings and decisions on numerous factual issues are clearly erroneous [and] without evidentiary support" (R. 21).[2] As required by the Board's rule, the Company's request contained a detailed analysis of the evidence in the record and full legal argument (R. 21–42). The Board denied review, stating that "no substantial issues warranting review" were presented; the Board also found "it unnecessary to rule at this time on the alleged factual errors * * * as it appears that [the director's] uncontroverted factual findings are sufficient to support the result reached" (R. 44–45).

The Union won the election and was certified as the representative of the driver-salesmen and distributors (R. 45–46). As a means of challenging the unit determination, the Company refused to bargain; an unfair labor practice complaint issued, and, after the Company filed its answer, the General Counsel of the Board moved for judgment on the pleadings, alleging that the issue had been settled in the representation proceeding (R. 49–63). In response to the Board's order to show cause why the motion should not be granted, the Company renewed its claim that the driver-salesmen were independent contractors, but offered no evidence not previously presented. It contended that the Board or a trial examiner acting on

[2] "R." references are to the appendix to the briefs in the court below; a copy has been filed with the Clerk.

its behalf was required to consider *de novo* the evidence introduced in the representation proceeding and to make original findings and conclusions before any unfair labor practice order could issue (R. 65-72). The Board granted the General Counsel's motion, relying on the above provisions of its rules barring relitigation in the unfair labor proceeding of issues determined in representation proceedings. It concluded that the Company had violated Section 8(a)(5) and (1) of the Act, and entered an appropriate order (App. C, *infra*, pp. 13a–23a).

The court of appeals declined to enforce the Board's order. Despite the statutory provision for delegation and discretionary review of representation issues, that court held that, before the Board could issue a valid unfair labor practice order based on a regional director's unit determination, it must review what that official has decided and "make its own determination as to whether the Regional Director's decision was right" (App. A, *infra*, p. 10a); the Board must "review the record before the Regional Director to determine whether his decision was correct, and not merely whether it was clearly erroneous" (App. A, *infra*, p. 9a). The court remanded the case to the Board for further proceedings consistent with its decision (App. A, *infra*, p. 10a).

REASONS FOR GRANTING THE WRIT

The holding of the court of appeals that the Board must grant plenary, *de novo* review of a regional director's unit determination before that determination

may form the basis for an unfair labor practice finding and order impairs the purposes of the delegation permitted by Section 3(b) of the Act, and presents an important question in the administration of the Act.

1. Section 9(c)(1) of the Act (App. D, *infra*, pp. 39a–40a) provides that, upon the filing of a representation petition, there shall be a hearing for the purpose of determining the appropriate bargaining unit and other election issues; based on the record of such hearing, an election is directed; and, if a union prevails, it is certified as the employees' bargaining representative. An employer who contests the validity of the election, including the unit determination, can obtain court review of his contentions only through an unfair labor practice proceeding under Section 10. He can refuse to bargain on the ground that the certification is invalid; if an unfair labor practice complaint issues and the Board ultimately finds that the refusal violated Section 8(a)(5) and issues an order requiring that the certification be honored, the employer may obtain review of that order and the underlying representation proceeding in the court of appeals, under Section 10 (e) or (f). The record of the representation hearing is before the court at that time. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473.

Since early Wagner Act days, it has been established that, absent newly discovered evidence or other exceptional circumstances, the employer is not entitled to relitigate in the unfair labor practice proceeding any issues which were litigated and determined in the representation proceeding. As this Court explained in

Pittsburgh Plate Glass Co. v. *National Labor Relations Board,* 313 U.S. 146, 158, 162, the representation and unfair labor practice proceedings "are really one [and] a single trial of the [representation] issue [is] enough."

2. Until 1959, the issues in a Section 9 representation proceeding as well as those in a Section 10 unfair labor practice proceeding were determined by the Board itself. In that year, Congress amended Section 3(b) to permit the Board "to delegate to its regional directors its powers under Section 9," including the power "to determine the unit appropriate for the purposes of collective bargaining." The exercise of those powers by regional directors was made subject only to discretionary Board review. On its face, this amendment indicates a congressional intention to endow the regional director with all the powers which the Board previously exercised in a Section 9 proceeding, subject to such review as the Board might provide. The Board's power in a representation proceeding was to decide bargaining unit and other election issues; absent special circumstances, its decision on such issues was not subject to relitigation in subsequent unfair labor practice proceedings. Since Section 3(b) places the regional director in the Board's shoes, it should follow that, absent special circumstances, determinations he makes in representation proceedings are not subject to reconsideration by the Board in subsequent unfair labor practice proceedings.

The legislative history of Section 3(b) confirms this analysis. Senator Goldwater, a member of the House-

Senate Conference Committee (II Leg. Hist. (1959)[3] 1351), stated (*id.*, at 1856):

> [Section 3(b)] is a new provision, not in either the House or Senate bills, designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors *for final determination.*
>
> Under this provision, the regional director can exercise no authority in representation cases which is greater or not the same as the statutory powers of the Board with respect to such cases. In the handling of such cases, the regional directors are required to follow the lawful rules, regulations, procedures, and precedents of the Board and to *act in all respects as the Board itself would act.*
>
> * * * * *
>
> This authority to delegate to the regional directors is designed, as indicated, to speed the work of the Board. * * * [Emphasis added.][4]

In short, Congress was willing to permit the Board to give its regional directors the power "to act in all respects as the Board itself would act" and make a "final determination" of representation issues, subject to such review as the Board might provide. Congress recognized that this would vest regional directors with important powers,[5] but concluded that the

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[3] "Leg. Hist. (1959)" refers to the two volume Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (GPO 1959).

[4] See also II Leg. Hist. (1959) 1722 (Rep. Udall), 1812 (Rep. Barden).

[5] Indeed, for this reason, it was suggested by some legislators that the regional directors should be appointed by the President and confirmed by the Senate, as are the members of the Board. See II Leg. Hist. (1959) 1452 (Sen. Dirksen), 1460 (Sen. Goldwater). This suggestion was not adopted.

objective of expediting case handling justified this step.[6]

3. The holding of the court below substantially impairs the purposes which Congress sought to achieve in amending Section 3(b), for it would make the regional director's decision "final" only where the representation proceeding does not culminate in an unfair labor practice proceeding; if the employer chooses to refuse to bargain, the Board would be required to "review the record before the Regional Director to determine whether his decision was correct, and not merely whether it was clearly erroneous" (App. A, *infra*, p. 9a), even though it had satisfied itself in an appellate capacity in the representation proceeding that the regional director's decision did not warrant review. A requirement in the unfair labor practice proceeding to review the entire record *de novo* and make an independent determination of the issues decided by the regional director is in apparent contradiction to the provision for discretionary review. Far from expediting the disposition of cases and reducing the Board's workload, as Congress intended, it would force the Board to look at each case twice. Moreover, where the employer elects to contest a cer-

[6] The court's decision is not supported by Congress' rejection, in 1961, of Reorganization Plan 5, which would have permitted the Board to delegate its power in all unfair labor practice cases to its trial examiners, subject to a discretionary review by the Board (App. A, *infra*, p. 9a). There is no indication that Congress, in rejecting this proposal, intended to diminish the power which it had previously conferred on the Board by Section 3(b) to delegate the determination of representation issues to its regional directors.

tification, no bargaining relationship is established until the Board has issued a bargaining order and that order is enforced by a court of appeals. By delaying the conclusion of the unfair labor practice proceeding, the court's holding substantially dissipates the benefits derived from prompt handling of representation proceedings.[7]

4. The decision below is in essential conflict with this Court's decision in *National Labor Relations Board* v. *Duval Jewelry Co.*, 357 U.S. 1, on which the court relied. In *Duval Jewelry*, this Court approved the Board's action in delegating its power to rule on petitions to revoke subpoenas to a hearing officer, because he "does not * * * have the final word"; "[u]ltimate decision on the merits of all the issues coming before him is left to the Board" (357 U.S. at 8). But the procedure by which the Board reserved the "final word" in the *Duval Jewelry* context, like the procedure for review of a regional director's determination of representation issues, gives the per-

[7] In the period July through December 1968, the average time between the filing of a representation petition and decision by the Regional Director was 50 days; where a decision by the Board occurred (either because a petition to review the regional director's determination was granted, or the director certified the case directly to the Board, 29 C.F.R. 102.67(h)), the average time was 225 days. In all probability the time added by a requirement that the Board review in a plenary manner all representation cases which form the basis for unfair labor practice proceedings would add even more than the 175-day difference between these figures to the Board's processing time. For the Board, with a larger caseload, would take longer to reach a case; and persons interested in delay would be prompted to increase the caseload even further by contesting decisions that would be complied with today.

son aggrieved only the right to request special permission to appeal; such permission is granted only if a substantial issue is presented. In approving this procedure this Court stated (357 U.S. at 7):

> The fact that special permission of the Board is required for the appeal is not important. Motion for leave to appeal is the method of showing that a substantial question is raised concerning the validity of the subordinate's ruling. If the Board denies leave, it has decided that no substantial question is presented * * *.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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National Labor Relations Board.

AUGUST 1969.

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[8] The Board made such a finding in the present case, explicitly stating in its telegraphic notification of denial of review that the regional director's uncontested findings sufficed to support the result reached (*supra*, p. 5).

APPENDIX A

United States Court of Appeals for the Second Circuit
September Term, 1968

Nos. 339, 340

Argued March 7, 1969—Decided March 25, 1969
Docket Nos. 32417 and 32418

PEPSI-COLA BUFFALO BOTTLING COMPANY AND SQUIRT-VERNORS OF BUFFALO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Before LUMBARD, Chief Judge, SMITH and KAUFMAN, Circuit Judges

Petition by the Company to set aside an order by the National Labor Relations Board on the ground that the Board's rule against relitigation prevented adequate review in an unfair labor practice proceeding of the prior decision of the regional director as to the appropriate unit for collective bargaining. The petition is granted and the action remanded to the Board.

Victor C. Silverstein, Buffalo, New York, for petitioner.

Vivian Asplund (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Elliot Moore, on the brief), for respondent.

KAUFMAN, *Circuit Judge:* The National Labor Relations Board has adopted a "rule against relitigation" which has the effect of denying to a litigant in an un-

fair labor practice action review by the Board of decisions made by a regional director in a prior representation proceeding, even if that prior decision is at the very heart of the unfair labor practice dispute. See 29 C.F.R. § 102.67. We find the Board's action pursuant to that rule unjustified in this case. Accordingly, the petition to set aside the Board's decision filed on May 2, 1968, is granted and the case is remanded to the Board for review.

Pepsi-Cola Buffalo Bottling Company and Squirt-Vernors of Buffalo, Inc. [hereinafter referred to jointly as Pepsi-Cola or the Company] bottle and market soft drinks in the Buffalo area. The Company moves its products primarily through the services of 54 "distributors." These distributors are individuals who each own or lease a single truck and alone, or in some instances with a helper, carry the soda to the retail stores which are Pepsi-Cola's customers. On February 15, 1967, the International Union of District 50, United Mine Workers of America [hereinafter the Union] filed with the Board a petition, subsequently amended on May 12, 1967, for certification as bargaining representative to negotiate with Pepsi-Cola for a unit which included the distributors, among others. The Company sought denial of certification insofar as it related to the distributors on the ground that they were independent contractors, not employees, and hence not properly includible in the bargaining unit.[1]

[1] The initial petition related only to 5 driver salesmen. The May 12 amendment added the distributors, and production and maintenance employees. The Company and Teamsters Local 264, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which was permitted to intervene in the proceedings, moved to dismiss the amended petition on the ground that the contract between the Company and the Teamsters covered production and maintenance employees and hence barred a representation proceeding involving these

See 29 U.S.C. § 152(3); *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254 (1968). An inquiry into the dispute was conducted by a hearing officer.[2] On the basis of this examination, the Acting Regional Director for the Board's Third Region on August 9, 1967 concluded that the distributors were employees and therefore ordered an election in a bargaining unit consisting of the distributors and driver salesmen. In the extended history of this dispute, this was the only determination made on the merits of this crucial issue.

Pepsi-Cola petitioned the Board to review the Regional Director's decision. As required by the Board's rule, the request for review was in a "self-contained" document "enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." 29 C.F.R. § 102.67(d). The standards set forth by the Board for granting review in such cases are highly restrictive. They require a petitioner to show not merely that the regional director's decision was erroneous, but that there are "compelling reasons" for review.[3] The Board thus denied Pepsi-

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employees. The regional director agreed that the contract was a bar and dismissed the petition insofar as it related to production and maintenance workers.

[2] The hearing officer is a Board employee, under the overall authority of the Board's General Counsel. See CCH Lab. Law, Rep ¶ 1120.0 at 3053. He is not to be confused with a "trial examiner" who is an independent "hearing examiner" within the meaning of the Administrative Procedure Act. 5 U.S.C. § 556, 5 U.S.C. § 3105.

[3] The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

"(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

"(2) That the regional director's decision on a substantial

Cola's petition on the ground that the issues raised were not substantial enough to warrant review. An election was then held in which a majority of those in the unit voted for the Union; the Board certified the Union as exclusive bargaining representative on October 26, 1967.

The Company, still convinced that the distributors were not employees, again sought to raise this issue before the Board. After consultation with counsel, it concluded that the way to bring the issue to a head was to decline to bargain, and by letter it so informed the Union. Predictably, as a result of the Company's action, the Board's General Counsel issued a complaint against Pepsi-Cola on January 26, 1968, charging that the refusal to bargain constituted an unfair labor practice in violation of 29 U.S.C. § 158(a) (1) and (5). In response, the Company's answer freely admitted the purported certification of the Union and its refusal to bargain, but reiterated its contention that the distributors were independent contractors.

At this point, the Company's well laid plans hit a snag. The General Counsel moved for summary judgment, relying on the Regional Director's decision in the representation proceedings, which the Board had already declined to review after its perusal of the Company's bare petition. The General Counsel's theory was that the decision of the Regional Director was final. 29 C.F.R. § 102.67(b). Further, the Board's own rule states "[d]enial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such

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factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

"(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

"(4) That there are compelling reasons for reconsideration of an important Board rule or policy." 29 C.F.R. § 102.67(c).

issues in any related subsequent unfair labor practice proceedings." 29 C.F.R. § 102.67(f). On May 2, 1968, the Board granted the motion for summary judgment and ordered Pepsi-Cola to bargain with the union. It evidently agreed with the General Counsel's approach, for, as the parties have presented the issues to us, it did not reopen the question whether the distributors were employees or independent contracts—the very reason for which the Company had decided to risk committing an unfair labor practice. Thus, the Board never reviewed the record independently of the Regional Director's conclusions on this issue, it simply swallowed his decision into its own.[4] It is this prohibition against disturbing the Regional Director's decision *for any reason* once the Board has concluded it does not meet the formidable standards for review set out in 29 C.F.R. § 102.67(c) which has brought Pepsi-Cola to this court.

II.

We are thus called upon to reconcile the Board's need to keep its house in an efficient manner by standards it believes will achieve that end with a litigant's right to have his case adjudicated by the persons Congress has chosen to make final decisions in labor cases. The Board's procedures, under 29 C.F.R. § 102.67 nat-

[4] Although the Board's ruling on the motion for summary judgment states that its findings of fact are made "on the basis of the record before it" we read this, as does the Board in its brief, to mean on the basis of the regional director's decision as to the appropriate unit. Our conclusion that the Board has refused to examine the record made before the hearing officer (not examiner) is buttressed by the fact that its only statements about the appropriate unit are unexplained conclusions. Moreover, the Board declares in its opinion "the Respondent * * * asserts that the Board * * * must undertake an independent *de novo* consideration of the evidence adduced at the hearing * * * We find no merit in these contentions." (Italics are the Board's.)

urally emphasize the sedulous disposition of controversies. It is a system of review not unlike that available upon a writ of certiorari, which has been called "the least satisfactory system of all." Auerbach, Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners, 48 Minn. L. Rev. 823, 865 (1964). In fact, the Board's procedure is even more cursory than certiorari since the petition for review must be a "self-contained" document, cut adrift from the record. In a certiorari proceeding, by contrast, the record itself is certified to the higher court for examination and is before it upon consideration of the petition.

This shift of responsibility is dramatically illustrated by the facts of this case. Even the Board admits that the resolution of the question whether the distributors are employees or independent contractors is difficult and requires a fine-drawn balancing of facts and law. And for precisely this reason the Board has urged that we follow the rule of *United Insurance Co., supra,* that where the choice is between "two fairly conflicting views," the court must defer to the Board's decision. But here, the Board has not actually considered the questions of fact and law, as it did in *United Insurance Co.* Concluding that the Regional Director had not erred egregiously, it merely rubber-stamped his decision. Thus, the Regional Director's decision was perpetuated even though it may in fact have been wrong. And were we now to apply the doctrine of *United Insurance Co.* we too would be blindly endorsing the questionable result. Such deference to the regional director was not intended by Congress. It decided that the Board itself must rule whether a litigant has committed an unfair labor practice. See 29 U.S.C. § 160(c); *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474 (1951). The Board seeks to use the rule against relitigation to carve out an ex-

ception for unfair labor practices that happen to arise in the context of a representation dispute, though conceding that if this unfair labor proceeding arose independently of the representation dispute the petitioner would have been entitled to full review by the Board of the Hearing Examiner's findings of fact and conclusions of law. We see no basis for thus mutilating the legislative scheme. The consequences of committing an unfair labor practice are the same no matter what the source of the dispute.

The very fact that the Board has great discretion in making judgments, cf. *Garner* v. *Teamsters Local 776,* 346 U.S. 485, 490 (1953), especially in representation matters, *N.L.R.B.* v. *A. J. Tower Co.,* 329 U.S. 324, 330 (1946), indicates a legislative purpose to confer final authority in these situations on the Board itself—not a subdelegatee. As another court has remarked, "While we recognize the considerable discretion with which the Board has been entrusted, it is proper to observe that with discretion goes responsibility." *N.L.R.B.* v. *Bonnie Enterprises,* 341 F. 2d 712, 714 (4th Cir. 1965) (dictum). In an unfair practice proceeding, the Board cannot completely abdicate its responsibility to a regional director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members.[5] Moreover, the Board's experience is particularly relevant and desirable in deciding complex issues relating to the appropriate bargaining unit before the potent sanctions arising from the finding of an

[5] "[A]nother risk is that subordinates will be less competent than agency heads, particularly where the superiors have been selected for their expertise in a certain field. In such a situation private parties have a strong claim to the personal attention of the agency heads." Note, Subdelegation by Federal Administrative Agencies, 12 Stan. L. Rev. 808, 812 (1960). Cf. *Porter* v. *Roach,* 69 F. Supp. 56 (D. Ore. 1946).

unfair labor practice are invoked.[6] See *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947); *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485 (1947).

Recognition of the importance of the Board's decision and judgment as distinguished from that of a subordinate was foreshadowed in *N.L.R.B.* v. *Duval Jewelry Co.*, 357 U.S. 1 (1958). In *Duval* the Court approved a procedure by which a Board subordinate was empowered to issue a subpoena *duces tecum*. But the Court tolerated this technique only because the hearing officer did not have the final power of decision; "[u]ltimate decision on the merits of all the issues coming before [the hearing officer] is left to the Board." 357 U.S. at 7. See also *Lewis* v. *N.L.R.B.*, 357 U.S. 10 (1958).

Although the legislative history of the Labor Act does not provide a clear answer to the question involved in this case,[7] Congress' treatment of certain bills involving the Board also supports analysis. For example, in 1961, the administration proposed reor-

[6] But the Supreme Court has indicated that a court's deference to the Board is not limited to issues involving the Board's expertise but extends to situations such as this, where the decision rests on the common law of agency, a law which a court might apply as effectively as the Board. *N.L.R.B.* v. *United Insurance Co.*, 390 U.S. at 260.

[7] 29 U.S.C. § 153(b) does permit the Board to delegate determination of appropriate bargaining units to a regional director. But this determination does not have the serious consequences that a finding of an unfair labor practice does. The purpose of the provision, added by House and Senate conferees late in the gestation period of the 1959 amendments to the Labor Act, was to speed the work of the Board. At the same time, however, Congress indicated that the regional directors would be kept in check by permitting review of their decisions by the Board itself. See 2 N.L.R.B., Legislative History of the Labor-Management and Disclosure Act of 1959, 1811–12 (1959).

ganization plans for many federal regulatory agencies. These plans sought to increase the power of the agencies to subdelegate authority to officials generally on the level of the Board's regional directors. The N.L.R.B. plan would have given these officials the power to make final decisions, subject only to the discretionary review of the agency's members. Although provisions to this effect were enacted into law for the Federal Trade Commission, the Civil Aeronautics Board, and the Federal Maritime Commission, Congress rejected, after long and sometimes acrimonious debate, similar provisions which would have applied to the N.L.R.B., the Securities and Exchange Commission and the Federal Communications Commission. The reason for this carefully considered refusal was precisely that Congress was reluctant to authorize all hearing examiners to render final, unreviewable decisions. Auerbach, *supra,* at 839. See also, 107 Cong. Rec. 10223, 12905–32 (1961).

We are mindful of the pressures upon the Board arising out of the many responsibilities assigned to it. It is not our desire, therefore, needlessly to require the Board to duplicate the work of its Regional Directors. Rather, we seek only to insure that, before taking the serious step of declaring that an employer has committed an unfair labor practice, the Board will simply review the record before the Regional Director to determine whether his decision was correct, and not merely whether it was clearly erroneous. It may be that in the greater number of cases such as this the result will be no different. However, it is in the cases which present difficult, factual and legal issues that the Board's superior knowledge and background is most desirable. Cf. *N.L.R.B.* v. *United Insurance Co., supra.*

What we have said is not to be construed as a declaration by us that Pepsi-Cola must be swathed

in the full procedural regalia provided by the Administrative Procedure Act, 5 U.S.C. 551 et seq. That Act deliberately excluded cases involving "the certification of employee representatives," from its coverage. 5 U.S.C. § 554(a)(6). Moreover, as we have noted, footnote 7, 29 U.S.C. § 153(b) permits the Board to delegate representation cases to its regional directors. Taken together, these provisions indicate a Congressional intent that representation matters be handled with dispatch, subject to the safeguard of plenary review by the Board at the unfair labor practice stage.

Nor does our decision in any way upset the Board's consistent refusal, absent a change in circumstances, to admit additional evidence in an unfair labor practice proceeding when the employer has had a full opportunity to present his case before the Regional Director. The purpose of the Board's rule in this regard is to bring all the evidence out at the start of the proceedings, so that the employer cannot withhold facts for the purpose of delay. See, e.g., *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 161–62 (1941); *N.L.R.B.* v. *American Steel Buck Corp.*, 227 F. 2d 927, 929 (2d Cir. 1955); cf. *N.L.R.B.* v. *Joclin Mfg. Co.*, 314 F. 2d 627, 630–32 (2d Cir. 1963). Pepsi-Cola does not ask leave to submit additional evidence before the Board. We emphasize that the objection is not to the Board's refusal to grant a hearing *de novo* on a proceeding properly delegated to a Regional Director, but its refusal to review what that official has decided and to make its own determination as to whether the Regional Director's decision was right.

Therefore, the petition for review is granted and the case is remanded to the Board for further proceedings not inconsistent with this opinion. We express no opinion as to whether the distributors in question are employees or independent contractors.

APPENDIX B

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of March, one thousand nine hundred and sixty-nine.

Present: Hon. J. EDWARD LUMBARD, Chief Judge, Hon. J. JOSEPH SMITH, Hon. IRVING R. KAUFMAN, Circuit Judges.

PEPSI-COLA BUFFALO BOTTLING COMPANY AND SQUIRT-VERNORS OF BUFFALO, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

A petition for review of an order of the National Labor Relations Board and a cross-petition to enforce said order.

This cause came on to be heard on a list of items comprising the record certified by the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the petition for review be and it hereby is granted and that the action be and it hereby is remanded to said National Labor Relations Board for further proceedings not inconsistent with the opinion of this Court with costs to be taxed against the respondent.

A. DANIEL FUSARO,
Clerk.

359-291—69——4

United States Court of Appeals for the Second Circuit

No. 32417–18

PEPSI-COLA BUFFALO BOTTLING COMPANY AND SQUIRT-VERNORS OF BUFFALO, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

MAY 15, 1969.

APPENDIX C

United States of America Before the National Labor Relations Board

No. 3–CA–3401

PEPSI-COLA BUFFALO BOTTLING COMPANY AND SQUIRT-VERNORS OF BUFFALO, INC.

v.

INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA

DECISION AND ORDER

Upon a charge filed by International Union of District 50, United Mine Workers of America, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, issued a complaint, dated January 26, 1968, against Pepsi-Cola Buffalo Bottling Company and Squirt-Vernors of Buffalo, Inc., herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1), and Section 2 (6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served upon the Respondent.

The complaint alleges that on or about October 26, 1967, the Union was duly certified as the exclusive bargaining representative in an appropriate unit, and that, since on or about December 18, 1967, Respondent

has refused and is refusing to recognize and bargain with the Union, although the Union has requested it to do so. On February 7, 1968, Respondent filed its answer to the complaint, in which it admitted some, denied some, and neither admitted nor denied other,[1] allegations contained therein, denied the commission of unfair labor practices and requested that the complaint be dismissed.

On February 16, the General Counsel filed with the Board a Motion for Summary Judgment, and a supporting memorandum, on the ground that no issue of fact or law is in dispute since all matters raised have been determined by the Board in the representation proceeding, and requesting, in view of Respondent's answer, that the Board enter judgment against Respondent on the pleadings. The Board issued its Order Transferring Proceeding to the Board and Notice to Show Cause on February 19; and on March 20, Respondent filed its Response with appendices attached in support thereof.[2]

Pursuant to the provisions of Section 3(b) of the Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

In its answer to the complaint, Respondent contends, *inter alia,* that it has committed no unfair labor practice in refusing to bargain with the Union; and

[1] In accordance with Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, all allegations in the complaint not specifically denied or explained are deemed to be admitted to be true and are so found by the Board.

[2] Respondent's request for oral argument is hereby denied as the documents hereinabove referred to adequately present the issues and the positions of the parties.

that the complaint, therefore, should be dismissed. For the reasons stated below, this contention is without merit.

The record establishes that, upon a petition filed in Case No. 3–RC–4098 by International Union of District 50, United Mine Workers of America, a hearing was held on May 10, 1967. Thereafter, on August 9, 1967, the Acting Regional Director issued his Decision and Direction of Election, in which he found, *inter alia,* that the Respondent's distributors are employees and not independent contractors, and directed an election in a unit of driver salesmen and distributors employed by Respondent at its Cheektowaga, New York, operation, which he found to be appropriate.

On August 31, the Respondent filed with the Board a Request for Review of the Acting Regional Director's finding that the distributors were employees and not independent contractors. On September 15, the Board denied the Request as raising no issues warranting review, finding it unnecessary to rule on alleged factual errors as the Acting Regional Director's uncontroverted factual findings were sufficient to support the result reached.

An election was held among the employees in the unit found appropriate on October 18. Upon conclusion of the balloting, the parties were furnished a tally of ballots which showed that of approximately 56 eligible voters, 49 cast ballots, of which 41 were for, and 6 were against, the Union. There were two challenged ballots. The challenges being insufficient in number to affect the results and no objections having been filed, the Regional Director, on October 26, 1967, certified the Union.

On December 18, 1967, and January 5, 1968, the Union requested that the Respondent bargain collectively with it. On December 18 and 19, 1967, and

January 7, 1968, these requests were refused. On December 22, 1967, the Union filed the charge upon which these proceedings are predicated.

In its answer and response, the Respondent contends that the distributors are independent contractors, and not employees, within the meaning of Section 2(3) of the Act. In support of this contention, the Respondent offers no additional evidence but asserts that the Board or a Trial Examiner must undertake an independent *de novo* consideration of the evidence adduced at the hearing in Case No. 3–RC–4098. We find no merit in these contentions.

It is well settled that, in the absence of newly discovered or previously unavailable evidence, the Board will not relitigate in a subsequent refusal-to-bargain proceeding matters which have been disposed of in a prior related representation case.[3] This is equally true where the representation proceeding was processed under Section 3(b) of the Act.[4] The Acting Regional Director's finding in this case that distributors are employees was reached after full litigation by the parties, and review was thereafter denied by the Board. The Respondent has admitted in its response to the Order to Show Cause that it does not seek to adduce any newly discovered or previously unavailable evidence. It is therefore clear, under established rules, that no basis exists for relitigating the status of the disputed employees in the instant proceeding.

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[3] See, e.g., *Pittsburgh Plate Glass Company* v. *N.L.R.B.*, 313 U.S. 116, 158–162; *Wilson & Co., Inc.*, 159 NLRB 485; *Texas Pipeline Company*, 129 NLRB 705, 707–708; *Clark Shoe Co.*, 88 NLRB 989, footnote 1. See, also *N.L.R.B.* v. *Control Products*, 355 F. 2d 245, 249–250 (C.A. 5).

[4] *Capital Bakers, Inc.*, 148 NLRB 438, 441–442. See "Rules and Regulations of the National Labor Relations Board, Series 8, as amended," Section 102.67(f).

Accordingly, we shall grant the General Counsel's Motion for Summary Judgment, and find that the Respondent's refusal on and after December 18, 1967, to bargain with the certified Union in the appropriate unit on the ground that distributors are independent contractors violated Section 8(a) (5) and (1) of the Act.

On the basis of the record before it, the Board makes the following:

FINDINGS OF FACT

1. *The Business of Respondent*

Respondent, Pepsi-Cola Buffalo Bottling Company and Squirt-Vernor's of Buffalo, Inc., are, and at all times material herein have been, a single integrated enterprise engaged in the business of bottling and distributing various soft drink beverages, such as Squirt, Vernors, Hires, and Crush, with principal offices and place of business at 2770 Walden Avenue, Cheektowaga, New York. During the past year, Respondent, in the course and conduct of its business, purchased, transferred, and delivered to its Cheektowaga, New York, plant, goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported to said plant from states of the United States other than the State of New York.

II. The Labor Organization Involved

International Union of District 50, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The representation proceeding*

1. *The Unit*

The following employees of the Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All driver salesmen and distributors employed by the Respondent at its operation located in Cheektowaga, New York, excluding office clerical employees, production and maintenance employees, third party operators, distributor's helpers, guards, professional employees, and supervisors as defined in the Act, as amended.

2. *The Certification*

On or about October 18, 1967, a majority of employees in the appropriate unit, by a secret ballot election conducted under the direction and supervision of the Regional Director for Region 3 of the National Labor Relations Board, designated and selected the Union as their representative for the purposes of collective bargaining with Respondent and on or about October 26, 1967, the Regional Director certified the Union as the exclusive collective-bargaining representative of the employees in that unit.

B. *The request to bargain and the Respondent's refusal*

On or about December 18, 1967, and January 5, 1968, the Union has requested and is requesting Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described appropriate unit. On December 18 and 19, 1967, January 7, 1968, and continuing to date, Respondent did refuse, and continues

to refuse, to bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.

Accordingly, we find that the Respondent has, since December 18, 1967, refused to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The acts of the Respondent set forth in Section III above, occurring in connection with the operations as described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement

CONCLUSIONS OF LAW

1. Pepsi-Cola Buffalo Bottling Company and Squirt-Vernors of Buffalo, Inc., is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. International Union of District 50, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All driver salesmen and distributors employed by the Respondent at its operation located in Cheektowaga, New York, excluding office clerical employees, production and maintenance employees, third party operators, distributor's helpers, guards, professional employees, and supervisors as defined in the Act, as amended, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 26, 1967, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on December 18, 1967, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Pepsi-Cola Buffalo Bottling Company and Squirt-Vernors of Buffalo, Inc., Cheektowaga, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with International Union of District 50, United Mine Workers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All driver salesmen and distributors employed at its operation located in Cheektowaga, New York, excluding office clerical employees, production and maintenance employees, third party operators, distributor's helpers, guards, professional employees, and supervisors as defined in the Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate unit, with respect to wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its place of business in Cheektowaga, New York, copies of the attached notice marked

"Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent, shall be posted immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 3, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C.

FRANK W. MCCULLOCH, *Chairman,*
JOHN H. FANNING, *Member,*
SAM ZAGORIA, *Member,*
National Labor Relations Board.

[SEAL]

APPENDIX

Notice to All Employees Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We will not refuse to bargain collectively with International Union of District 50, United Mine Workers of America, as the exclusive collective-bargaining representative of all the following employees:

[5] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

"All driver salesmen and distributors employed at our Cheektowaga, New York operation, excluding office clerical employees, production and maintenance employees, third party operators, distributors helpers, guards, professional employees, and supervisors as defined in the Act."

We will not in any like or related manner interefere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

We will upon request bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit, and if an understanding is reached we will sign a contract with the Union.

Pepsi-Cola Buffalo Bottling Company and Squirt-Vernors of Buffalo, Inc., (Employer).

By

(Representative)

(Title)

Dated ----------

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 4th floor, The 120 Bldg., 120 Delaware Avenue, Buffalo, N.Y., 14202 (Tel. No. 842-3100).

DECISION AND DIRECTION OF ELECTION

United States of America Before the National Labor Relations Board, Third Region

No. 3–RC–4098

PEPSI-COLA BUFFALO BOTTLING COMPANY AND SQUIRT-VERNOR'S OF BUFFALO, INC.,[1] EMPLOYER

v.

INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, PETITIONER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Acting Regional Director.

Upon the entire record in this case, the Acting Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organizations involved claim to represent certain employees of the Employer.[2]

3. A question affecting commerce exists concerning the representation of certain employees of the Em-

[1] The name of the Employer appears as amended at hearing.

[2] Teamsters Local 264, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, was permitted to intervene in this proceeding on the basis of an adequate showing of interest.

ployer within the meaning of Section 9(c)(1) and Section 2 (6) and (7) of the Act.

4. The Petitioner in its original petition filed February 15, 1967, sought to represent a unit of the Employer's driver salesmen. On May 10, 1967, during the course of the hearing, the Petitioner by motion amended its unit to include all production and maintenance employees, driver salesmen and distributors. On May 12, 1967, the Petitioner filed an amended petition which set forth the aforementioned enlarged unit. When the hearing reconvened on May 15, 1967, the Employer and the Intervenor moved to dismiss the amended petition on the basis that a current contract covering the production and maintenance employees sought herein constituted a bar to any further proceeding involving these employees.

The Employer's production and maintenance employees, now numbering about 35–40, have been represented by the Intervenor and a predecessor union on a separate basis for a period well in excess of eight years. The Employer and the Intervenor have had three successive agreements covering said employees, each containing identical union shop and automatic renewal clauses; the first agreement executed July 10, 1963, became effective April 17, 1962, and expired by its terms on April 16, 1965; the second agreement executed July 15, 1965, became effective April 17, 1965, and expired by its terms on April 16, 1967; and the third and current agreement executed May 2, 1967, became effective April 17, 1967, and is due to expire by its terms on April 16, 1969. The Petitioner made its initial demand for the production and maintenance employees at hearing on May 10, 1967, when it amended the unit to include said employees. The current agreement does not contain a pro-

vision specifically requiring ratification as a condition precedent to the validity of said agreement.

The Petitioner, contrary to the Employer and Intervenor, contends that the current agreement should not be a bar to its amended unit since said agreement was not properly ratified. Petitioner, at the hearing, also questioned the legality of the union shop provision in the current agreement because of its retroactive feature. The Intervenor, in its brief, takes the position that this union shop clause, even though retroactive, is proper since it could be legally interpreted.

Directing attention to ratification as relating to contract bar, the Board has long held that:[3]

> Where ratification is a condition precedent to contractual validity by express contractual provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition, but if the contract itself contains no express provisions for prior ratification, prior ratification will not be required as a condition precedent for the contract to constitute a bar.

Inasmuch as the current agreement covering the production and maintenance employees does *not* contain a provision requiring ratification as a condition precedent to validity, I find that this agreement may constitute a bar to the Petitioner's amended petition insofar as it seeks to represent the Employer's production and maintenance employees. In reaching this conclusion, I find it unnecessary for contract bar purposes, to consider whether in fact the current agreement was ratified or properly ratified.

Concerning the retroactive feature of the current agreement, the Board has held, in substance, that where two contracts both with legal union shop clauses overlap during the retroactive period, if the clause in

[3] *Application Shale Products Co.*, 121 NLRB 1160, 1163.

the current contract can be legally interpreted, it bars a petition.[4] In the instant matter the three agreements between the Employer and Intervenor have provided for continuous coverage under legal union shop clauses. The current agreement has no retroactive application to employees who were employed during the term of the prior agreement, and who continue to be employed during the term of the current agreement, as they have continuously been required to be and become members of the Intervenor. In the case of new employees hired after the expiration of the prior agreement, they are not required to become members until the 31st day after employment and are not, therefore, affected by the retroactivity of the current agreement which was executed approximately 16 days after the expiration date of the prior agreement. Furthermore, the prior agreement automatically renews itself for one year in the absence of written notice of termination by either party. The record is devoid of any evidence to establish such notice was given. Based on the foregoing, I find that the current contract can be legally interpreted, and that it therefore may constitute a bar.

There remains a third point relating to contract bar to which the parties did not address themselves. The Board has held that contracts validly executed after an original petition has been filed, but before an amendment to the petition, bars the amendment where the amendment claims a unit larger and substantially different from that sought in the original petition.[5] However, if the amendment only adds fringe groups and does not enlarge or substantially change the orig-

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[4] *Weyerhaeuser Company*, 142 NLRB 702, 703.

[5] *Evans Pipe Company*, 121 NLRB 15; *Polk Brothers, Central Appliance and Furniture Company*, 105 NLRB 251; *Herff Jones Company*, 97 NLRB 1070; and *Hyster Company*, 72 NLRB 937.

inal unit, the intervening contract will not be a bar.[6] Here the petition, by its amendment, seeks to add production and maintenance employees, about 35–40 in number, to the some 60 driver salesmen and distributors which it originally sought. Under these circumstances, I find that Petitioner's amendment seeks a unit larger and substantially different from that in its original petition and that, therefore, the intervening current contract may bar the amendment.

Based on my above findings, the motions of the Employer and the Intervenor to dismiss the Petitioner's amended petition are granted to the extent that said petition seeks the Employer's production and maintenance employees who are covered under a current agreement which I have found to be a bar to further proceedings herein involving these employees.

This leaves for consideration a unit consisting of driver-salesmen and distributors. The Employer, at its operation, employs six driver-salesmen and approximately 54 distributors, who are engaged in the distribution of either Pepsi-Cola or Squirt and Vernor's soft drinks. The Employer and Intervenor contend that the driver-salesmen, who are on the Employer's payroll, are employees properly includable in the unit found appropriate herein. The Petitioner, although seeking to include these employees in its amended petition, at the hearing took the position they should be excluded. With regard to the distributors, the Petitioner and Intervenor would include them in the unit as employees while the Employer would exclude them as independent contractors.

The Employer and the distributors, for approximately the last eight years, have operated under an oral agreement. The distributors pay nothing for the route which they are assigned by the Employer and

[6] *Kaiser Cement & Gypsum Corporation*, 158 NLRB No. 148.

are required to service only their particular route. The Employer unilaterally determines stops on its route and the territory they will cover and does not permit its distributors to service customers outside their territory. If this occurs distributors who are guilty of the infraction may be required to compensate the distributor on whose route the trespass occurred. The oral agreement requires distributors to keep their trucks neat and clean. Either the Employer or the distributors may terminate their agreement at will. However, distributors may not sell or pass their routes to third parties since only the Employer decides who its distributors will be.

The distributors are required by the Employer to give at least weekly delivery to the customers on their routes; to distribute exclusively either Pepsi-Cola or Squirt and Vernor's [soft drinks]; to purchase these soft drinks from the Employer only; to call the office once per day so that messages from customers may be relayed to them; to load at the plant in the mornings at times scheduled by the Employer; to have their trucks painted Pepsi-Cola or Squirt and Vernor's colors with the Employer paying half the cost; to furnish each week to the Employer's office five pre-dated signed checks, one check being filled in and presented on a daily basis as payment for merchandise received by the distributor each day that week; and to clear credit for customers through the Employer. A distributor may switch morning loading time with another distributor but this would be a rare occurrence.

The distributors are expected to wear Pepsi-Cola or Squirt and Vernor uniforms which they must purchase; attend sales meetings called by the Employer; follow a price list which is fixed by the Employer; and work at least a five-day week which is the regular

work week. The sales meetings are also attended by the Employer's driver-salesmen and sales supervisors.

The sales supervisors call on customers and sell the Employer's products without the distributors being present. The customer account is then turned over to the distributor in whose territory the customer is located, but the distributor is not charged in any way for this new business. If a customer desires to drop his account, the distributor involved reports this fact to the sales supervisor and the latter follows up the account. If the distributor desires to drop a customer he is required to consult with the sales supervisor before doing so. Any leads on possible new customers are usually referred by the distributors to the sales supervisor. Generally, the sales supervisors provide distributors with new customers about four or five times a year. If a customer complains for one reason or another the complaints are reported to the Employer and the sales supervisor inquires into the matter. New distributors are trained for a period of two weeks by sales supervisors who accompany and instruct them on procedures to be followed in servicing their route. The sales supervisors also make periodic checks on distributors to determine whether or not the methods of advertising and the servicing of customers are being carried on by the distributors in a satisfactory fashion. Check sheets are prepared by the sales supervisors when the periodic inspections are made. These check sheets are reviewed by the head sales supervisor and if it is necessary to improve some aspect of the distributor's service or method of service, then the head sales supervisor consults with and suggests corrections to the distributors involved. Advertising in the various customer's places of business is usually cleared with the customer by the sales supervisors. On occasion distributors themselves obtain the customer's

permission to erect a display. If a distributor fails to service a customer in any given week the sales supervisor usually confronts this distributor and directs him to do so.

The Employer services credit customers usually consisting of chain stores and major independently owned stores. The distributors in whose territories these stores are located make the deliveries and for such deliveries are credited with merchandise on the load which they pick up the next morning. The credit customers are sold by the Employer, their credit is cleared by the Employer, their bills are paid directly to the Employer and any loss which may arise is solely the Employer's responsibility. On occasion distributors have given credit to those customers on their routes for whom the Employer has refused to clear credit and in these cases the distributor involved would be responsible for any failure on the part of the customer to make payment. However, these accounts are few and the bulk of credit accounts are the responsibility of the Employer. In the morning when distributors load at the point it is their responsibility to see that their trucks are loaded with the proper merchandise in the proper quantity and to check the loading sheets which contain the list of merchandise loaded that day. If there is a shortage due to the failure to load merchandise, the distributors take the loss. If merchandise is stolen or broken the distributors take the loss except that the Employer assumes responsibility for damage due to breakage on one case and the bottles contained therein. There are tables at the Employer's plant near the office for use by the distributors in doing their various book work. They are required to use pay phones at the plant and have access to the plant restrooms. The distributors in servicing their routes on occasion are called upon to refill vending machines.

Some of these vending machines are owned by the distributors in whose territory they are located. If the vending machines require repairs the vending mechanics employed by the Employer make the repairs at no cost to the distributor. This is true regardless of whether the distributor or the Employer owns the vending machines requiring repair.

The distributors own or lease their own trucks; determine the amount of their loads and the order of stops on their routes; pay for repairs on their trucks; purchase gas, oil license plates and insure their trucks (the names of the Employer and the distributor appear on the liability insurance policy); assume any losses in the event that their trucks are disabled and they are unable to work; pay $30 a month rental for parking their trucks in the Employer's garage if they use such facilities; derive their income by subtracting their expenses from their collections; are not bound by safety rules prescribed by the Company; are not prohibited from using their trucks for other purposes but in practice do not do so; are not provided by the Employer with hospitalization insurance, paid vacation, sick pay; do not punch a time clock; hire individuals to assist them at their own expense; operate on their own schedule with the exception that they must follow the Employer's morning loading schedule; are provided with boxes at the plant for incoming messages and tables for writing purposes; are not provided with locker facilities at the plant; and their net income is about $260 to $270 per week.

The driver salesmen operate in virtually the same manner as the distributors except as follows. The driver salesmen receive a salary of approximately $120 per week plus commissions based on a percentage of cases delivered. The Employer owns or leases, washes, services, repairs and insures the trucks they

operate. Their trucks are painted at no cost to them; the Employer provides them fringe benefits such as hospitalization insurance, paid vacations, and sick pay; safety equipment is purchased and placed on their trucks by the Employer; they may not carry credit accounts which are not cleared by the Employer; they are not paid for overtime; the sales supervisors have more frequent contact with the driver salesmen and may service their route during periods of vacations or illness; the Employer owns all the merchandise they deliver; the Employer provides them with uniforms at no cost; they are not required to deposit five checks the first of the week; they turn in monies collected for soft-drinks delivered each day; and they are on the Employer's payroll.

The Board has frequently held that in determining the status of persons alleged to be independent contractors, the Act requires application of the "right to control" test. Where an employer for whom the services are performed retains the right to control the manner and means by which a result is to be accomplished, the relationship is one of employment; while on the other hand, where control is reserved only as to the result sought, the relationship is that of independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.[7]

Based on the above facts, I am satisfied that the distributors herein are not independent contractors. Although the record discloses some factors which are usually considered to indicate an independent contractor status, the presence of these factors does not alone establish such status. Thus, I am not persuaded nor do

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[7] *Pepsi-Cola Bottling Company of Michigan, Grand Rapids Division*, 156 NLRB 80, 83; *National Freight, Inc.*, 146 NLRB 144, 146.

I regard as controlling, the fact that distributors provide and service their own equipment and that they may work for profit rather than wages.[8]

The result to be accomplished through the distributorship arrangement is the circulation of the Employer's products for retail sale to the general public. In accomplishing this result the distributors have little independence such as would be found in businessmen whose earnings are controlled by self-determined policies, personal investment and expenditures, and market conditions. The distributors herein do not have a proprietary interest in their routes, and cannot dispose of them since the Employer alone determines who its distributors will be.

The routes of the distributors are regulated by the Employer in terms of location size, and sales practices; the distributors are in practice effectively limited to the sale of products which the Employer distributes; the Employer's sales supervisors go into the distributors' territories and apparently obtain all new customers which are then turned over to the distributors at no cost for servicing, thereby demonstrating the distributors' dependence on the Employer's sales force for new business and increased profits; the Employer unilaterally determines the prices at which products will be sold and provides the distributors with a price list which list is followed and the Employer directs the distributors to report for loading at scheduled times, to follow a prescribed procedure in making payments, to call the plant office once per day and to paint their trucks prescribed colors for which the Employer pays half the cost. Although there are no formal requirements for distributors to attend sales

[8] See *The Seven-Up Bottling Co. of Detroit*, 120 NLRB 1032, 1034.

meetings or wear uniforms, the Employer has sought compliance with such practices. Sales promotion and technique are centered in the Employer and distributors are assisted or overseen in these regards by the Employer's sales supervisors, which supervisors also train new distributors and check and evaluate the performance of all distributors. Furthermore, these supervisors follow up lost accounts and handle complaints. The distributor's risk of loss is minimized to a significant extent by the Employer's extension of credit to charge accounts, where in the event payment is not made, the Employer takes the loss. In these cases, all the distributors do is service the account.

In view of the fact that the distributors have minimal control of the manner and means by which their work is to be accomplished and meager opportunity to make decisions which would affect their profit and loss, and upon the entire record, I find they are employees within the meaning of the Act, and accordingly, include them in the unit herein.[9] In addition, I find that the driver salesmen are properly includable in the unit found appropriate since their interests are common with those of the distributors.

Based on the above and the record as a whole, I find that the following employees of the Employer constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All driver salesmen and distributors employed by the Employer at its operation located in Cheektowaga, New York, excluding office clerical employees, production and maintenance em-

[9] *Mews Syndicate Co., Inc.*, 164 NLRB No. 69; *Pepsi Cola Bottling, supra; Eureka Newspapers, Inc.*, 154 NLRB 1181, 1184, and cases cited therein.

ployees, third party operators,[10] distributor's helpers,[11] guards, professional employees and supervisors[12] as defined in the Act, as amended.

Direction of Election

An election by secret ballot will be conducted by the undersigned Acting Regional Director among the employees in the unit found appropriate at the time and

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[10] The Employer would exclude third party operators from the unit as independent contractors and the Petitioner and Intervenor take no position in this regard. The Employer has an oral understanding with three individuals known as third party operators whereby these operators purchase soft drinks from the Employer and distribute the same to vending machines which they own. These operators purchase these vending machines either through the Employer or outside manufacturers; own, service, and insure their own trucks; load at the Employer's plant as the need arises, in some cases several times in a given day and often not every day; solicit their own business; negotiate arrangements for sale of the Employer's soft drinks directly with the customer; set their own prices for the products they distribute; distribute other products obtained from other employers such as candy and cigarettes; are not in any way supervised by Employer's representatives; may discontinue their relationship with the Employer at their own discretion and continue to distribute other products; are not required to call in; receive no fringe benefits from the Employer; and derive their income from collections less expenses. Based on the above facts, I find that third party operators are independent contractors.

[11] The record reveals that the distributors on occasion retain individuals to assist them in servicing their routes. The record is devoid of any evidence to show, and the parties do not contend, that these distributors' helpers are employees of the Employer. Therefore, I exclude them from the unit found appropriate herein.

[12] At hearing the parties stipulated that the Employer's sales managers, assistant sales managers and sales supervisors possess the indicia of supervisory authority as described in Section 2(11) of the Act. Based on this stipulation, I shall exclude them from the unit.

place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who quit or have been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[13] Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by International Union of District 50, United Mine

[13] Three copies of an election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, The 120 Building, 120 Delaware Avenue, Buffalo, New York 14202 on or before August 16, 1967. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsiors Underwear Inc.*, 156 NLRB 1236.

Workers of America, or by Teamsters Local 264, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or by neither.

Dated at Buffalo, New York, this 9th day of August, 1967.

THOMAS H. RAMSEY,
Acting Regional Director,
National Labor Relations Board,
Third Region,
The 120 Building—
120 Delaware Avenue,
Buffalo, New York 14202.

APPENDIX D

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 3 (b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purposes of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. * * *

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees

or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

Sec. 9. (d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be

made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The following provisions of Board Rule 102.67 (29 C.F.R. 102.67) are also relevant:

> Sec. 102.67 *Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal transfer of case to Board; proceedings before the Board; Board action.*
>
> (a) The regional director may proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. * * *
>
> (b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D.C. Such request shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies shall not be filed and if submitted will not be accepted. Copies thereof shall be served simultaneously on all other parties to the proceeding and the regional director in the same manner used to file with the Board, except that if personal service is made upon the Board, service upon the other parties shall be made in such manner as would reasonably insure receipt by the other parties within 3 days after the date of service upon the Board. A statement of such service shall be filed simultaneously with the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate

as a stay of any action taken or directed by the regional director: *Provided, however,* That the regional director, in the absence of a waiver may issue a notice to election but shall not conduct any election or open and count any challenged ballots until the Board has ruled upon any request for review which may be filed.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

* * * * *

(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor

practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

* * * * *

(h) In any case in which it appears to the regional director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing.

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No. 469

IN THE

Supreme Court of the United States

October Term, 1969

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PEPSI-COLA BUFFALO BOTTLING COMPANY and SQUIRT-VERNORS OF BUFFALO, INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CICRUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Presented

1. Whether or not respondent as a party accused of an unfair labor practice, has been deprived of the procedural due process guaranteed to it by § 10 of the National Labor Relations Act, as amended, and by the Administrative Procedure Act?

2. Whether or not the application of the Board's "Rule Against Relitigation" has deprived respondent of any of the procedural rights or safeguards afforded by the said statutory provisions?

3. Whether or not the combined effect of the Board's limited standard of review and representation cases and the application of its "Rule Against Relitigation" in this

unfair labor practice proceeding has deprived respondent of its statutory right to the mandatory, plenary, *de novo* review which the Board is required to grant to a party accused of an unfair practice?

4. Whether or not the result of the Board's action was an unlawful subdelegation to its Acting Regional Director of the Board's power and responsibility for deciding whether or not an unfair labor practice has been committed?

Statute and Rules Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*) and of the NLRB Statements of Procedure (29 C. F. R. 101.20 (c)) are set forth in App. A, *infra*, p. 11.

Statement

The respondent accepts the statement set forth in pages 2 through 6 of the petition except as hereinafter set forth.

When an unfair labor practice complaint issued under the authority of Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. § 141 *et seq.*), herein called the "Act", the Company answered the complaint admitting the certification and its refusal to bargain but again asserting the Board's lack of jurisdiction on the ground that the distributors were in fact independent contractors. The General Counsel filed a "motion for summary judgment" calling for application of the Board's so-called rule against the relitigation of previously determined issues. The Company filed a response to the motion, detailing its objections to such summary procedure and claiming its rights as an accused in an unfair labor practice proceeding to the administrative due process guaranteed by

Section 10 of the National Labor Relations Act and by Sections 5, 7, 8 and 11 of the Administrative Procedures Act, as amended, 60 Stat. 237, 5 U. S. C. 1001 *et seq.*, herein called "APA". The Board sustained the "motion for summary judgment," refusing to consider the evidence as to the status of the distributors as independent contractors, and entering a conclusory finding on the basis of the Acting Regional Director's decision that all of the distributors are employees within the meaning of Section 2(3) of the Act.

Reasons for Denying the Writ

None of the reasons set forth by the petitioner are valid reasons for this court's granting the writ requested herein. The following arguments will attempt to refute those reasons set forth in the petition.

1. As to petitioner's first reason, petitioner overlooks the fact that an unfair labor practice complaint is a completely different type of a proceeding from a representation case and that the employer herein, the respondent, did not ask to relitigate the issues in the unfair labor practice proceeding. Merely, the respondent asked that the Board weigh the evidence brought out in the representation case in making their determination in the unfair labor practice proceeding. Respondent has always contended that it has been deprived of the statutory rights and protections guaranteed to parties accused of unfair labor practices by the Administrative Procedure Act (herein called the "APA") and by the National Labor Relations Act, as amended herein called the "Act").

The case of *Pittsburgh Plate Glass Co. v. National Labor Relations Board,* 313 U. S. 146, 61 S. Ct. 908 (1941) involved

exclusion of evidence. Although the language of the Court's opinion in Pittsburgh Plate Glass and the context in which it was uttered should suffice, in itself, to demonstrate that petitioner's arguments are thereby foreclosed, it is submitted, in addition, the unalterable fact that the APA HAD NOT BEEN PASSED AT THE TIME THE PITTSBURGH PLATE GLASS DECISION WAS HANDED DOWN. As a matter of fact, the APA did not become law until six years later in 1947.

Finally, by way of further reinforcement, is the fact that in 1941, when the Pittsburgh Plate Glass decision was handed down, Section 10(c) of the National Labor Relations Act read as follows:

> "The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice . . ."

In 1947 that section was Amended in relevant part by the Labor Management Relations Act as follows:

> ". . . IF UPON THE PREPONDERANCE OF THE TESTIMONY TAKEN the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, . . . etc." Section 10(c).

The 1947 amendments also added the requirement, for the first time, that complaint proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . ." Section 10(b).

Since neither statute had been enacted arguments based upon the denial of the procedural rights guaranteed by the APA and the LMRA, could not have been before this Court in the Pittsburgh Plate Glass case. Nor have these issues been dealt with or even alluded to in any of the subsequent United States Courts of Appeals decisions upholding application of the Board's rule against relitigation.

Again, it must be emphasized that respondent has not asked leave to submit additional evidence before the Board. The objection is not to the Board's refusal to grant a hearing *de novo* on a proceeding properly delegated to a regional director, but its refusal to review what that official has decided and to make its own determination as to whether the regional director's decision was right.

2. As to petitioner's second reason, which claims that Congress desires the regional directors "to act in all respects as the Board itself would act" and make a "final determination" of representation issues, subject to such review as the Board might provide, it must be emphasized that this still does not delegate to the regional director the right to decide unfair labor practice proceedings.

The petitioner states that Congress felt that the grant of this power was justified in order to carry out the objective of expediting case handling. However, this Court in commenting on a court review of an unfair labor practice proceeding did not interpret the desires of Congress to expedite cases as being so high in priority as to abandon the rights of the employer. *Boire v. Greyhound Corp.*, 376 U. S. 473, 84 S. Ct. 897 (1964). This was pointed out in Boire v. Greyhound Corp. when this Court said, at 376 U. S. 479 and 84 S. Ct. 894 as follows:

> "That this indirect method of obtaining judicial review imposes significant delays upon attempts to chal-

lenge the validity of Board orders in certification proceedings is obvious. But it is equally obvious that Congress explicitly intended to impose precisely such delays."

In addition, "Congress has determined that the price of greater fairness is not too high." *Wong Yang Sung v. McGrath*, 339 U. S. 33, 46-47, 70 S. Ct. 445, 452 (1950). The procedural safeguards of the APA and NLRA were established by Congress in response to strong demands for reform in administrative procedure. The Board, unlike the petitioner, has "ready and persuasive access to the legislative ear" (*Ibid.*), and if error was made by including all complaint preceedings within the coverage of the APA and by surrounding these proceedings with procedural safeguards contained in the Act itself, "relief from Congress is a simple matter." *Ibid.* The application of the rule against relitigation in the context of this case should not be sanctioned.

3. In response to reason three of the petition, it should be noted that the petitioner's argument is that the Board would have to review the record in the unfair labor practice proceeding "even though it had satisfied itself in an appellate capacity in the representation proceeding that the regional director's decision did not warrant review." This fully points up the standards in the two different proceedings which supports the position of the respondent. At no point, does the Board in the representation case see the record, but, on the contrary, the Board reviews a "self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." NLRB Rules and Regulations §102.67, 29 C. F. R. 102.67.

Again, it must be remembered "that the price of greater fairness is not too high." The fact that the result of an

unfair labor practice can result in the potential finding of contempt is something that must be considered, whereas a representation case is specifically stated to be "non-adversary in character" by NLRB Statements of Procedure § 101.20 (c), 29 C. F. R. § 101.20 (c).

The rights given by the APA and the Act do not exist in a vacuum, but are part and parcel of specific Congressional policy decisions made in response to the problems posed by the emergence of federal administrative agencies as the "fourth branch" of the federal government. They exist in order to insure that the rights of private litigants will not be sacrificed in favor of the need for expeditious determination of individual cases. *Ramspeck v. Federal Trial Examiners Conference,* 345 U. S. 128, 73 S. Ct. 570 (1953); *Wong Yang Sung v. McGrath, supra.*

It may be so that a representation case should be expeditiously handled, however, it is submitted that this should not be done by the abandonment of the rights of private litigants.

4. In response to petitioner's fourth reason which claims that the decision below is in essential conflict with this Court's decision in *NLRB v. Duval Jewelry Co.,* 357 U. S. 1, 78 S. Ct. 1024 (1958), it is submitted that there is no inconsistency. The controversy there grew out of the issuance of subpoenas in the course of representation proceedings. The relevant statute [section 11(1) of NLRA, 29 U. S. C. § 161(1)] gave a person served with a subpoena *duces tecum* the right to "petition" the Board to revoke, and provided that "the Board shall revoke the subpoena if in its opinion", the statutory requirements were not satisfied. After the issuance of the subpoenas in question, the employer moved that the Board revoke them. The Board refused to entertain this motion to revoke on the ground that, under its Rules and Regulations, such motions

require "an initial ruling by the hearing officer" (357 U. S. at 4, 78 S. Ct. at 1026). Subsequently, the hearing officer, after granting an opportunity for a hearing, denied the motions to revoke. That ruling was not appealed to the Board, and when the employer refused to comply with the subpoenas, the Board commenced a proceeding to enforce them. The District Court and Court of Appeals had ruled in the employer's favor, holding that, under the above provision of section 11(1), the Board alone could rule on motions to revoke subpoenas *duces tecum* in representation proceedings.

Emphasizing (a) that the Board's Rules provided machinery for appealing the regional director's denial of the employer's motion to revoke—machinery which the employer had not attempted to utilize in that case—and (b) the preliminary nature of the regional director's ruling on the employer's motion to revoke (357 U. S. at 5-8, 78 S. Ct. at 1027-28), this Court upheld this delegation by the Board of "the right to make a preliminary ruling" on the motion to revoke (357 U. S. at 7, 78 S. Ct. at 1028). In so ruling, this Court was careful to note that the officer before whom the representation proceeding was held:

> "does not, of course, have the final word. Ultimate decision on the merits of all the issues coming before him is left to the Board. That is true of motions to revoke subpoenas *duces tecum*, as well as other issues of law and fact. That degree of delegation seems to us wholly permissible under this statutory system. We need not go further and consider the legality of the more complete type of delegation to which most of the argument in the case has been directed."

This complete type of delegation, the legality of which was thus pretermitted by this Court in Duval Jewelry, is precisely the type of delegation that was before the Court below. It must be noted that Duval Jewelry was decided at a point in time before the Board's delegation

of its powers in representation cases to the regional director pursuant to section 3(b) of the Act and before the Board's standard of review in representation cases was correspondingly limited.

Respondent's subdelegation argument should be considered in light of the fact that this Court has made it clear that an agency will not be empowered to effect such a complete delegation where, by either the express provisions of the underlying organic statute in question, or by implication, such power has been withheld. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 121, 67 S. Ct. 1129, 1134 (1947); see *NLRB v. John S. Barnes Corp.*, 178 F. 2d 156, 159 (7th Cir. 1949). The petitioner's claim that the Board is authorized by the Act to delegate its decision-making power in complaint proceedings to trial examiners, must fail in view of the express provisions of Section 10(c) of the Act, 29 U. S. C. § 160(c), to the contrary. Indeed the Board itself has consistently viewed the Act as withholding this authority (see NLRB Statements of Procedure § 101.12, 29 C. F. R. § 101.12)[1] and accordingly, the Board has appealed to Congress to authorize it to bring about such a delegation, while retaining the discretionary right to review the action of its delegate. Although such statutory reorganization plans were approved for the CAB, FTC and FMC (Federal Maritime Commission), the plan for the NLRB was disapproved, along with those for the FCC and SEC.[2] The most recent

[1] See also CCH Current Comments ¶ 8036 (speech by Board Member Fanning on 9/29/66 reaffirming this Board interpretation); Auerbach, Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners, 48 Minn. L. Rev. 823, 862-64 (1964); see also NLRB v. John S. Barnes Corp., 178 F. 2d 156, 161 (7th Cir. 1949) (Board's open and consistent construction of Act entitled to weight in determining meaning thereof).

[2] Congressional reports and debates on this proposed (and rejected) reorganization plan for the NLRB (known as "Plan No. 5 for 1961") may be found at H. Rep. No. 576, 87th Cong., 1st Sess. (1961); S. Rep. No. 571, 87th Cong., 1st Sess. (1961); 107 Cong. Rec. 10223, 12 905-32, 13 023, 12069-78 (1961).

edition of the Board's unsuccessful attempts to persuade Congress to authorize such a subdelegation of unfair labor practice jurisdiction to trial examiners appears in the form of a bill recently introduced into Congress by Senator Javits of New York, discussed at CCH Current Comment ¶ 8019.

It would be incongruous, to say the least, if the Board, through the guise of its rule against relitigation, could effectuate by administrative rule an amendment to its organic statute which it has been unable to accomplish through the proper legislative channels. Respondent's contention in this regard should follow *a fortiori* from the above analysis, since the effect of the rule against relitigation is to delegate the Board's decision-making powers in unfair labor practice proceedings not to independent trial examiners, but to regional directors, around whose "judicial" functions even fewer safeguards have been placed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*) are as follows:

Sec. 10 (b) * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

Sec. 10 (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice * * *.

The following provisions of NLRB Statements of Procedure (29 C. F. R. 101.20(c)) are also relevant:

Sec. 101.20(c) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.